

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP925

Cir. Ct. No. 2009CV1208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ASSOCIATED BANK, NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

**MILLER HOMES OF HUDSON, LLC, SAMUEL E. MILLER, LEO A.
DRAVELING AND MONICA J. DRAVELING,**

DEFENDANTS-APPELLANTS,

**MCCULLOUGH & SONS, INC., COUNTRYWIDE BANK, FSB, CENTENNIAL
BRANCH AND BANK OF AMERICA, NATIONAL ASSOCIATION,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Miller Homes of Hudson, LLC, Samuel Miller, and Leo and Monica Draveling (collectively “Miller Homes”) appeal a foreclosure summary judgment in favor of Associated Bank National Association. Miller Homes argues genuine issues of material fact preclude summary judgment. We disagree and affirm.

¶2 Between 2005 and 2008, the parties executed a series of written loan documents relating to ten construction loans. The relevant terms of the loan agreements were essentially identical, aside from the specific loan amounts, interest rates and maturity dates. In each case, a note was executed that specified a date on which Miller Homes would begin payments, as well as a date when repayment of the entire borrowed principal was to be made. Modification agreements were later executed by the parties that extended the maturity dates, and ultimately the maturity date on each loan was extended. Each loan was secured by a mortgage against a parcel of real property and certain personal property.

¶3 Each note further stated Associated Bank was entitled, upon default, without further notice, to declare the entire unpaid balance and all accrued unpaid interest immediately due and payable. Each note also contained a provision providing for cross-collateralization and cross-default.

¶4 As additional security, Miller Homes executed a Commercial Security Agreement dated September 17, 2008, granting Associated Bank another lien against, and security interest in, all present and future personal property owned by Miller Homes. Associated Bank perfected its interest in the personal property by filing a financing statement on September 22, 2008. Leo Draveling also executed a guaranty under which he guaranteed performance of all

obligations owed by Miller Homes pursuant to the loan documents. Under the guaranty, Draveling's liability was unlimited and continuing.

¶5 The mortgages, security agreement and guaranty all define default in a manner identical to the notes. Each contains a cross-collateralization and cross-default provision, and each provides Associated Bank with the same rights and remedies available to it under the notes. Each of the mortgages also contains a specific statement that:

This Mortgage, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Mortgage. No alteration of or amendment to this Mortgage shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

¶6 In March 2009, Associated Bank placed Miller Homes' loans in a "Special Loan Group," which was a group of loans that would no longer be granted extensions. Associated Bank thus declined to grant extensions to loans that had maturity dates in June 2009, amounting to almost \$2,000,000 in outstanding loans coming due on that date. Miller Homes defaulted by failing to timely pay all sums due under the notes, and due to material adverse changes in their financial condition.

¶7 On September 17, 2009, Associated Bank commenced an action seeking foreclosure, replevin, and enforcement of guarantee, among other things. Miller Homes counterclaimed, alleging breach of contract, misrepresentation,

breach of the implied duty of good faith and fair dealing, and violation of the Truth in Lending Act.¹

¶8 Associated Bank sought summary judgment, arguing Miller Homes defaulted under the terms of the loan documents by, among other things, failing to timely pay the principal balance of the notes. Miller Homes responded that a twenty-five-year relationship between the parties “clearly established a common basis of understanding relating to the loan agreements.” Miller Homes insisted both parties understood the loans matured upon the sale of the underlying property. Therefore, Miller Homes insisted a genuine issue of material fact existed concerning whether Associated Bank breached the contractual terms. Miller Homes also asserted Associated Bank’s decision to cease extending loans, coupled with its alleged failure to provide notice that the relationship may be in jeopardy, constituted a breach of the implied duty of good faith and faith dealing, as well as misrepresentation.

¶9 The circuit court granted summary judgment in favor of Associated Bank and dismissed Miller Homes’ counterclaims. The court also denied a motion for reconsideration. This appeal follows.

¶10 Summary judgment methodology is well-established. We review summary judgment decisions using the same standards and methods applied by the circuit court. Under WIS. STAT. § 802.08(2),² a moving party is entitled to

¹ We do not discern Miller Homes’ appeal to involve the circuit court’s ruling concerning the Truth in Lending Act. Accordingly, we deem the issue abandoned and will not further address it. See *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

² References to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶11 At the outset, we note Miller Homes completely ignores the loan documents in its principal brief to this court, never citing the documents in its twenty-eight-page argument. Miller Homes argues its own interpretations of the loan documents should be superimposed on the written documents, to effectively provide that “these loans would be extended so long as Miller [Homes] was making its payments and marketing the underlying properties.”

¶12 However, the loan documents constitute the only contracts between the parties in this case, and Miller Homes does not allege Associated Bank breached any express terms of the loan documents. The loan documents expressly state they constitute “the entire understanding and agreement of the parties.” The documents also specifically provide that no alteration or amendment of their terms “shall be effective unless given in writing and signed.”

¶13 Under the loan documents, Associated Bank was not required to continue to extend credit to Miller Homes. The loan documents provide that “the granting, renewing or extending of any Loan by [Associated Bank] at all times shall be subject to [Associated Bank’s] sole judgment and discretion.”

¶14 The provisions of the loan documents were not waived or modified by Associated Bank’s previous agreements to extend maturity dates. Miller Homes has not alleged that Associated Bank accepted performance from Miller Homes that was inconsistent with any term of the loan documents. *See WIS. STAT.*

§ 401.303(5)(a). When Associated Bank agreed to extend maturity dates, the parties always signed extension agreements in compliance with the loan documents, which contemplated modifications, but required that the modifications be in writing. Furthermore, Associated Bank made clear in writing that “[n]o prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender’s rights or of any of the Grantor’s obligations as to any future transactions.”

¶15 Quite simply, Associated Bank extended credit to Miller Homes when it believed Miller Homes was good for the credit, but declined when it no longer believed Miller Homes was able to fulfill its obligations. Miller Homes may be disappointed with this business decision, but it did not create an issue of fact regarding an agreement outside the loan documents. *See Schaller v. Marine Nat’l Bank*, 131 Wis. 2d 389, 395-400, 388 N.W.2d 645 (Ct. App. 1986) (bank’s decision whether to pay overdrafts is a discretionary business decision).³ Associated Bank had a contractual right under the loan documents to call the loans due at maturity, or upon any default. Associated Bank did not, by previously agreeing to extend maturity dates, bind itself to continue to do so into the indefinite future until the underlying collateral securing the loans was sold. *See id.* at 401-03. The circuit court properly dismissed the counterclaim for breach of contract.

³ Miller Homes does not attempt to address *Schaller v. Marine National Bank*, 131 Wis. 2d 389, 395-400, 388 N.W.2d 645 (Ct. App. 1986). Arguments not refuted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 There was also no breach of the covenant of good faith and fair dealing as the allegedly offending conduct was specifically authorized by the terms of the contract. *See M&I Marshall & Isley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521. “Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties’ contract as a ‘bad faith’ breach of that contract.” *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988). As mentioned, Associated Bank had a right under the loan documents to call the loans due at maturity, or upon any default. We thus specifically reject Miller Homes’ contention that Associated Bank terminated the relationship “as a knee-jerk reaction to the current economic times and not the strength or viability of the builders.”

¶17 The circuit court also properly concluded Miller Homes failed to set forth any actionable misrepresentation by Associated Bank, and that Miller Homes did not reasonably rely upon Associated Bank’s alleged promises, which were inconsistent with the loan documents. Miller Homes has not alleged that Associated Bank ever specifically stated it would continue to extend the loans. Rather, Miller Homes argues it was told by Associated Bank that “everything was fine,” and that Associated Bank would “continue working with it.” Miller Homes insists these alleged statements are tantamount to a specific promise that “the loans will continue to be extended.”

¶18 In this regard, Miller Homes fails to conform to the requirements of WIS. STAT. RULE 809.19, citing generally to “Record Index No. 140,” which is the multi-page affidavit of Leo Draveling. It should be clear to all lawyers that appellate briefs must give references to pages of the record on appeal for each statement and proposition made in the appellate brief. *See* WIS. STAT. RULE

809.19(c), (d) and (e). We will not search the record for evidence to support a party's argument. See *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127. We will therefore not consider Miller Homes' unsupported assertions. In any event, we conclude the circuit court properly held that, as a matter of law, such vague and indefinite remarks concerning future events do not rise to the level of reasonable reliance.⁴

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁴ Miller Homes also contends internal bank documents “clearly state that the principal balance of the loan was primarily repayable upon the sale of the property.” In support of this contention, Miller Homes cites generally to multiple pages of its appendix, in violation of WIS. STAT. RULE 809.19. Regardless, Associated Bank responds that Miller Homes mischaracterizes these internal documents, and further asserts that Miller Homes was not privy to, and never saw these documents before discovery was conducted in this litigation. Miller Homes replies that it “did not need to see the documents in order to rely upon their contents” Miller Homes' reply in this regard is unsupported by citation to legal authority and we shall therefore not consider it. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

